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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re A.V., a Person Coming Under the
Juvenile Court Law.

ORANGE COUNTY SOCIAL SERVICES
AGENCY,

Plaintiff and Respondent,

v.

D.V.,

Defendant and Appellant.

G046550

(Super. Ct. No. DP018282)

O P I N I O N

Appeal from a postjudgment order of the Superior Court of Orange County,
Gary Bischoff, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Affirmed.

Marissa Coffey, under appointment by the Court of Appeal, for Defendant
and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen, Supervising Deputy County Counsel, and Julie J. Agin, Deputy County Counsel, for Plaintiff and Respondent.

No appearance for the Minor.

* * *

In the dependency case of now three-year-old A.V. (son), the juvenile court terminated parental rights and established adoption as the permanent plan. (See Welf. & Inst. Code, § 366.26.)¹ D.V. (mother) appeals, asserting the court erred by failing to apply the “benefit exception.” (See § 366.26, subd. (c)(1)(B)(i).)² As substantial evidence supports the court’s findings on this point, we affirm the court’s postjudgment order.

FACTS

Son was born in January 2009 to mother and her boyfriend at the time, J.V. (father). Mother was 17 years old and father was 19 years old at the time of son’s birth.

Jurisdiction and Disposition

Orange County Social Services Agency (SSA) detained son at the hospital in March 2009. SSA filed a juvenile dependency petition on March 24, 2009, alleging: “On or about March 21, 2009 and between the hours of approximately 2 or 3 o’clock

¹ All statutory references are to the Welfare and Institutions Code.

² Although the father of son was involved in the case below, he does not appeal and we therefore emphasize facts pertaining to mother.

a.m., while in bed with the nine week-old [son] and [father], the child's mother . . . grabbed the infant child . . . by the arm, yanking hard enough to cause an oblique fracture to the child's left humerus." "[D]espite the child crying inconsolably since that time, [the mother and father] waited until approximately 8 o'clock a.m. . . . before seeking medical treatment for [son]." SSA alleged jurisdiction of the juvenile court based on the nonaccidental infliction of serious physical harm on son (§ 300, subd. (a)) and failure to protect (§ 300, subd. (b)).

Parents initially insisted they had no idea how the injury occurred. Mother soon volunteered that she had grabbed son by the arm to pull him to her when son started crying during the night. Hearsay statements by doctors (included in the SSA report) suggested it was unlikely the injury was accidental because of the force required to cause a broken humerus.

At the initial detention hearing, the court approved the detention of son and found there was a substantial danger to the physical health of son. On March 26, the court approved son being released to parents pursuant to a supervised release agreement.

On April 17, 2009, however, son was taken back into protective custody. Initial examinations of X-rays suggested there had been "additional broken bones on the child's left and right tibia." It appeared these were "healing fracture[s]" that were "older fractures than that of the humerus bone fracture." These new apparent injuries led to the filing of an amended petition. Ultimately, by July 2009, SSA conceded it could not be determined whether irregularities in the X-rays were actually fractures.

On July 8, 2009, parents entered into a stipulated disposition with regard to the allegations of the amended petition. Parents pleaded no contest to section 300, subdivisions (a) and (b), allegations in the first amended petition. The plea was based solely on the factual allegations relating to son's broken arm on March 21, 2009. Parents agreed that the court should declare son to be a dependent child of the juvenile court and that the welfare of the child required that custody be taken from parents. The court

approved the stipulated disposition as well as SSA's proposed case plan. Parents participated in visitation and parenting services.

Extended Reunification Period

Parents ultimately failed to reunite with son, despite more than two years of visitation, services, and brief periods during which son was returned to the supervised custody of parents. Son was placed in at least 10 different homes during this period.

In May 2010, son was released to parents in maternal grandparents' home for a 60-day trial visit. On July 7, 2010, the court adopted SSA's recommendation to return custody to parents. But on July 29, 2010, SSA detained son because he was present during an incident of domestic violence between mother and father. "The father refused to allow the mother to leave the room so she attempted to crawl out of a window with the child . . . in her arms. The mother refused to give the car keys to the father so the father threw the mother on the bed while she was still holding the child in her arms and wrestled with the mother for the keys." The court sustained a supplemental petition and ordered that custody be taken away from parents.

By 2011, mother had a job and placement in an appropriate shelter. But mother had a new boyfriend. Boyfriend had a drinking problem ("20 to 30 beers at weekend parties") and had at least one disclosed occasion when he had a verbal confrontation with mother leading to her being stranded in Los Angeles County. Evidence suggested mother lied to her social worker to hide her continued relationship with boyfriend. As a result, SSA insisted upon mother's visitation to be monitored. In July 2011, mother disclosed she was pregnant with boyfriend's child and had moved in with boyfriend's family.

An August 2011 trial release with father failed after 10 days. At around the same time, mother continued to demonstrate the unstable nature of her relationship with boyfriend. She indicated on August 21 that she was going to seek a restraining order

against boyfriend, but reported to SSA two days later with boyfriend asking about possible consequences in the dependency case depending on boyfriend's conduct.

The court terminated reunification services on September 14, 2011. According to the court, mother "knew that the [social] worker had every intent of placing this child in her care and . . . knew that all she had to do was to continue to work on the issues that she had already started to work on and remain in a safe place And despite that . . . she decides to go live with [boyfriend], who she has indicated is exactly the kind of person that all of her training and all of her classes and all the services that she received indicated she should not be with."

Section 366.26 Hearing

The court held a contested section 366.26 hearing on January 18, 2012. Father was not present, having cut off contact with his counsel since September 2011. Maternal grandparents appeared and requested custody, but the court declined this request. Mother had married boyfriend and given birth to a daughter, who was also placed in protective custody.

SSA's report recommended the court terminate parental rights and establish a permanent plan of adoption. Son had been placed with prospective adoptive parents since February 15, 2011. Son "adjusted well in the home and appears to be bonded to the prospective adoptive parents. Their relationship with [son] developed prior to his being placed in the home while the prospective adoptive mother was [son's] emergency child care provider." "The prospective adoptive parents are very capable of meeting the child's needs." Son "appears comfortable in his home environment and appropriately interacts with the prospective adoptive parents. [Son] refers to the prospective adoptive mother as 'mama' and the prospective adoptive father as 'papa.'"

"During the last period of supervision, the child's mother has maintained regular contact with the child. Visits are supervised and take place twice a week for two

hours at the visitation center The visitation monitor reports the mother is consistent about visits with the child and so far has missed two visits due to car problems and not feeling well The monitor reports the child has difficulty when he first arrives to the visits as he cries and expresses he does not want to stay for the visits nor have his caretaker leave him. The foster mother has stayed for part of the visits to comfort the child and redirect him so that he stays for the visit with his mother. The visitation monitor reports the mother brings toys and food to share with the child. She reports they interact through play, watch child friendly movies, and share meals. She also reports the mother demonstrates a parental role by being attentive to the child's needs."

SSA took the position with regard to mother that she "has not resolved the issue of domestic violence with her boyfriend, nor has her boyfriend demonstrated he has addressed and resolved his substance abuse. Most recently the child's mother reported she is now married to her . . . boyfriend."

The court heard testimony from the social worker and mother. The social worker reiterated and expanded upon information contained in the SSA report. The social worker cited mother's continued relationship with her boyfriend as the primary factor explaining mother's inability to regain custody of son. The social worker confirmed that mother fulfilled a parental role while visiting son by caring for him in an appropriate manner. Mother testified to her desire to regain custody or otherwise maintain a relationship with son. Mother claimed her relationship with her boyfriend (now husband) was much better than it was earlier due to their mutual participation in counseling classes.

The court found by clear and convincing evidence that son was adoptable and therefore terminated parental rights. The court also found that termination of parental rights would not be detrimental to son and that it would instead be in son's best interest. The court observed: "[T]he child, clearly . . . does not view mother as the

child's mother . . . [D]espite all the visitation that's occurred, it has not resulted in a parental relationship between the child and the mother”

DISCUSSION

Section 366.26, subdivision (c)(1)(B)(i), provides in relevant part: “If the court determines . . . by a clear and convincing standard, that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. . . . Under these circumstances, the court shall terminate parental rights unless either of the following applies: [¶] . . . [¶] (B) The court finds a compelling reason for determining that termination would be detrimental to the child due to one or more of the following circumstances: [¶] (i) The parents have maintained regular visitation and contact with the child and the child would benefit from continuing the relationship.” (See also Cal. Rules of Court, rule 5.725(d)(2).)

Mother does not contest the court's finding that son will likely be adopted. “Once the court determines the child is likely to be adopted, the burden shifts to the parent to show that termination of parental rights would be detrimental to the child under one of the exceptions listed in section 366.26, subdivision (c)(1).” (*In re S.B.* (2008) 164 Cal.App.4th 289, 297.) Mother instead claims the court should not have terminated parental rights based on the so-called “benefit exception,” i.e. there is a “compelling reason for determining that termination [of parental rights] would be detrimental to” son (§ 366.26, subd. (c)(1)(B)) because mother “maintained regular visitation and contact with the child and the child would benefit from continuing the relationship” (*id.*, subd. (c)(1)(B)(i)).

It is uncontested that mother has maintained regular visitation. The issue is whether son would benefit from continuing his parental relationship with mother. “Although the statute does not specify the type of relationship necessary to derail

termination of parental rights, case law has required more than ‘frequent and loving contact.’ [Citation.] ‘[T]he court balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent’s rights are not terminated.’” (*In re Clifton B.* (2000) 81 Cal.App.4th 415, 424.)

“The factors to be considered when looking for whether a relationship is important and beneficial are: (1) the age of the child, (2) the portion of the child’s life spent in the parent’s custody, (3) the positive or negative effect of interaction between the parent and the child, and (4) the child’s particular needs.” (*In re Angel B.* (2002) 97 Cal.App.4th 454, 467, fn. omitted.) Even assuming mother “maintained a relationship that may be beneficial to some degree” with son (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1350), such showings are insufficient to derail the legislative preference for adoption at this stage of the proceedings if the relationship “does not meet the child’s need for a parent.” (*Ibid.*) “A biological parent who has failed to reunify with an adoptable child may not derail an adoption merely by showing the child would derive *some* benefit from continuing a relationship maintained during periods of visitation with the parent.” (*In re Angel B., supra*, 97 Cal.App.4th at p. 466.)

Our review of the entire record convinces us that substantial evidence supports the court’s finding on this issue. (See *In re B.D.* (2008) 159 Cal.App.4th 1218, 1235.) Son was very young (nine weeks old) when he was first detained; he spent crucial years in the custody of other caregivers, including his current caregiver. Mother failed to prioritize her relationship with son despite numerous chances afforded to her. Son’s references to his current caregivers as “mama” and “papa” support an inference that he does not view mother as a parental figure. Other than the general sentiment that a relationship with one’s biological mother is beneficial, there is very little evidence

suggesting that son's needs would be met by continuing a parental relationship with mother. The court was entitled to conclude that any harm in terminating son's relationship with mother would be minimal in comparison to the security and stability he stood to gain by being adopted.

Mother likens this case to *In re Amber M.* (2002) 103 Cal.App.4th 681, which held that the benefit exception had been established. (*Id.* at p. 689-691.) But in that case, the record included strong evidence (including expert psychological opinion) that the three dependent children would be harmed by ending their relationship with mother. (*Id.* at pp. 689-690.) The social worker's contrary opinion was not supported by actual evidence. (*Id.* at p. 690.) In the case before us, mother did not meet her burden of establishing that son would benefit from continuing a relationship with her.

DISPOSITION

The postjudgment order is affirmed.

IKOLA, J.

WE CONCUR:

ARONSON, ACTING P. J.

FYBEL, J.